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1952.

File No. O.Cr.P.C./52 Pt. I

Legal Department—

A BRANCH

Subject:—Opinions under the Code of Criminal Procedure, 1898.

(For subsequent pps. pl. see pt. II)

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File No. O.Cr.P.C./52 Part I

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C O N T E N T S.

Legal Department File No. 0. Cr. P.C./52.

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RVY. 16/6.

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EVY. 18/6.

Office of the R.L.A.

The inquiry papers establish a prima facie case against Shri V.S. Sohoni for an offence under section 182, I.P.C. in respect of the false allegations made by him against the Mahalkari Shri Dulani in his letter dated the 5th September 1951 addressed to the Honourable the Home Minister Shri Morarji Desai. The complaint will have to be failed by the Honourable Shri Morarji Desai, vide section 195(1)(a) of the Criminal Procedure Code, if prosecution is to be undertaken.

J.R.D.
Sd/- ~~D.V. VIAS~~,
Remembrancer of Legal Affairs.

U.R. to R.D., No. 79, dated the 5th January 1951.

EVY. 15/6.

Office of the R.L.A.

Under section 197A of the Criminal Procedure Code, the sanction must be previous to the taking of cognizance. Summoning of the accused or taking any evidence against him amounts to taking cognizance (see R^g vs. Parashram Keshav 7 B.H.C.R. 61 and Desaibhai Khushalbhai vs. Emp A.I.R. 1938 Bom. 50). If the Magistrate has taken cognizance before the necessary sanction was obtained, the Magistrate will have to commence proceedings afresh by examining the complainant and verifying the complaint (see Desaibhai Khushalbhai Supra). It is not necessary to withdraw the case and file it afresh.

J.R.D.

Sd/- ~~D.V. VYAS~~,

Remembrancer of Legal Affairs.

M.R. to M.D. No. 91, dated the 7th January 1952.

EVI. 15/6.

Office of the R.L.A.

The allegations made in the letter dated 14-12-1951 from the complainant Shri Ardeshir B. Subedar and in the copy of the complaint forwarded with that letter do not establish a prima facie case for the offense of a criminal conspiracy between the accused to commit acts of criminal misappropriation. This is therefore not a fit case for grant of sanction under section 196A of the Criminal Procedure Code.

J. R. D.
Sd/- ~~D.V. VIAS~~,
Remembrancer of Legal Affairs.

U.R. to M.D., No. 94, dated the 7th January 1952.

MVI. 13/6.

Office of the R.L.A.

A draft sanction for an offence under section 477A Indian Penal Code in respect of the item of Rs. 81/- is forwarded herewith.

2. A draft sanction in respect of the item of Rs. 448/- dated 12-12-1946 is not forwarded because it is not quite clear whether the item relates to one bill or more than one bill. The letter of the Collector dated 28-5-1951(p.1 ante) shows that the sum covers two items of Rs. @ 224/- each dated 11-9-1946 and 12-12-1946 respectively. It is necessary to obtain further information on the point so as to avoid a mis-joinder of charges in respect of the item of Rs. 448/-.

Sd/- P.M. LAD,

Remembrancer of Legal Affairs.

U.R. to H.D., No. 141, dated the 8th January 1952.

EVY. 15/6.

Office of the R.L.A.

On the facts of the case, the offences under section 342, 366 and 376 Indian Penal Code, alleged to have been committed by the Police Inspector Shri R.K. Bhaskar cannot be said to have been committed "while acting or purporting to act in discharge of his official duty", and therefore sanction under section 197 Criminal Procedure Code is not necessary.

Sd/- P. M. LAD,

Remembrancer of Legal Affairs.

U.R. to H.D., No. 57-Confl, dated the 12th January 1952.

EVI. 15/6.

Office of the R.L.A.

Sub-section (1) of section 471 of the Code of Criminal Procedure provides that whenever the finding of the Court states that the accused person committed the act alleged, the Court shall, if such act would, but for the incapacity found, have constituted an offence, order such person to be detained in safe custody in such place and manner as the Court thinks fit, and shall report the action taken to the State Government. In this case the Sessions Judge was satisfied that the accused Devappa was not in a state of mind to understand the nature of the act committed by him; he therefore acquitted him of the offence of murder. But for this circumstance Devappa would have been convicted for murder. Under sub-section (1) therefore it was incumbent upon the Judge to order his detention in safe custody. He was, therefore, ordered to be detained in such custody in the Belgaum Central Prison; and he has reported the matter to Government. It seems, however, that further action now will have to be taken by the State Government and not by the Sessions Judge as stated in the Home Department note. In this connection sub-section (1) of section 474 of the Code provides that if in the case of a person detained under sub-section (1) of section 471 the Inspector General (who may be the Officer in charge of the Jail - vide sub-section (2) of section 471) certifies that in his judgment the person may be released without danger of his doing injury to himself or to any other person, the State Government can order him to be released or to be detained in custody or to be transferred to a public lunatic asylum. Section 475 further empowers the State Government to deliver such person to the custody of his relative or friend. It would be seen from these provisions that the required action for the release, detention or otherwise of a person acquitted on account of his mental

condition at the time he committed the offence will have to be taken by the Government. The object underlying the Sessions Judge's order of detention under sub-section (1) of section 471 being only to facilitate the Government giving effect to their orders in the case. "The privilege of deciding whether the accused shall be released or not lies with the State Government and not with the Court. The accused must be in a custody within ready reach of the State Government". (Provincial Government vs. Krishan Gopala, A.I.R. 1945. Mad. 77: Mitra's Cr. Pro. Code. p. 1389). The view expressed in the Home Department note that as Devappa is neither a prisoner nor a lunatic he should have been set at liberty is not correct in view of the special provision made in section 471. It would, therefore, be for the Home Department to call for a report from the Officer in charge of the Belgaum Central Prison so as to enable them to pass the necessary orders in regard to Devappa.

Sd/- P.M. LAD,
Remembrancer of Legal Affairs.

U.R. to H.D., No. 796, dated the 18th January 1952.

EVY. 15/6.

L.D.R.I. No. 2433, dt. 4-2-52.

Office of the R.L.A.

The legal position is as stated in the opinion of the Additional Secretary (No. 16783, dated 22-10-1951) and the procedure indicated in that opinion should be followed.

Sd/- P.M. LAD,

Remembrancer of Legal Affairs.

U.O. to R.D., No. 2010, dated the 8th February 1952.

EVY. 15/6.

The presumption made by H.D. that the only action possible is under section 401 of the Code of Criminal Procedure is correct. Although sub-section (2) of that section does not make it obligatory on the State Government to consult the presiding Judge of the Court before or by which the conviction was had or confirmed, having regard to the fact that the conviction in this case was confirmed by the High Court, which I understand dismissed the appeal summarily, and also having regard to the necessity of getting information regarding the steps which may have already been taken by the Court for recovering the fine, it would seem necessary to make a reference under sub-section (2) to the Court by which the conviction was had; and such report may be obtained from that Court through the High Cour.

Sd/-x P.M.LAD,

Remembrancer of Legal Affairs.

U.R. to H.D., No. 3707, dated 10-3-1952.

KVI. 15/6.

Office of the R.L.A.

Police Investigation-Final report-whether Magistrate can take cognisance-nature of Magistrate's Order.

When an investigation under Chapter XIV of the Criminal Procedure Code, 1898, is completed the Officer in charge of the Police Station is required by Section 173 (which appears in Chapter XIV) to forward to a Magistrate empowered to take cognizance of the offence on a Police report, a report in the prescribed from setting forth the names of the parties, the nature of the information, and the names of the persons who appear to be acquainted with the circumstances of the case. Now the forms prescribed for these reports are of two kinds, namely, (1) Charge-sheets in form C.P.C. 20 and (ii) Final Reports in Form C.P.C. 19. In the charge-sheet report the Police make out a case and desire the Magistrate to proceed against the suspects. In the final report the Police desire the Magistrate to drop the proceedings on one of the following three grounds namely,

A. : The case is true but cannot be proved.

B. : The case is false; and

C. : The case is neither true nor false.

These are called respectively the granting of 'A', 'B' and 'C' Summary.

2. The questions arising for consideration on this reference are:-

(1) Whether, when the Police submit a final report to the Magistrate under section 173 of the Criminal Procedure Code, 1898, requesting grant of A, B or C summary, the Magistrate can direct the Police to send up a chargesheet and if not whether in such circumstances, he can take cognisance of the case under section 190 (1)(b) of the Criminal Procedure Code and issue process:

(2) Whether, if the Magistrate takes cognisance under section 190(1)(b), he can direct the Police Prosecutor to prefer a complaint and whether the Police Prosecutor would be entitled to fees for conduct of the case treating it as a non-police case; and

(3) Whether the orders passed by the Magistrate under section 173 granting a summary are administrative or judicial?

3. When the Police submit a final report the Magistrate cannot direct them to send up a charge-sheet. There is no authority for him under section 173 or any other provision of law to do so. As pointed out in Venkata Suba Rao v/s. Ajanyulu (33 Cr. L.J. 785), "The Police must be allowed to form their own opinion of a case when submitting their report and a Magistrate cannot ask them to change their opinion merely because he does not agree with them". But he can by virtue of section 190(1)(b) take cognisance of any offence which may be disclosed upon the report made by the Police. He is a Magistrate who, as stated in section 173, is "empowered to take cognizance of the offence on a Police report" and a report of the police under section 173 is report which falls within the expression of the words " a report in writing of such facts made by the police officer" used in section 190(1)(b) (see Mehrala v/s. Emperor 26 Cr. L.J. 181). The Magistrate is not bound under section 173 or section 190 to accept the view taken by the Police about the alleged offense; but he has in the words of Teja Singh C.J. in Harban Singh vs. the State and another (A.I.R. (39) 1952, Pepsu, 29), "every right to look into the Police Diaries, to carefully scrutinize the investigation and to make up his mind independently of what the Police has said as to whether the recommendation made by them is well founded. In fact, ... it is the Magistrate 's duty to do all this." (see also Boy-

wala Vs. Sorab Engineer, 43 Bom. L.R. 529). That being so, if on applying his mind independently he comes to the conclusion that an offence has been disclosed of which he should take cognizance, he can proceed to do so under section 190(1)(b). Attention is also invited in this connection to para IIIO of the Police Manual (6th Edition), which appears to be based on letter No 957 of 7-6-94 from the Registrar, High Court, Bombay to the District Magistrate, Ratnagiri, which lays down that it is not competent to a Magistrate to return an investigating officer's report made to him under section 169 of the Criminal Procedure Code, with an order to make a case against the accused and to send it up for trial. If the Magistrate considers that there is a prima facie case against the accused he should take action under section 204 of the Code.

4. If the Magistrate takes cognizance under section 190(1)(b) no complaint is necessary and therefore the second of the above questions raised on this reference does not survive.

5. On the third question, the decisions of the various High Court are not uniform, some being of the view that the order passed by the Magistrate under section 173 is an administrative order, and some of the view that it is an a judicial order. The former view of the Bombay High Court was that it was an administrative order (see Emperor vs. Chandabhai, 14 Bom. L.R. 1160), but the later view is that it is a judicial order (Boywalla vs. Sorab Engineer, 43 Bom. L.R. 529, and Emperor vs. Balaji Appaji, 47 Bom. L.R. 664). This later view must, for the present, be accepted as the prevalent view of the Bombay High Court.

Sd/- P.M. LAD,
Remembrancer of Legal Affairs.

U.R. to H.D., No. 2892, dated the 22nd, February 1952.

EVY. 15/6.

Office of the R.L.A.

There would be no legal objection to the Magistrate allowing a person from Saurashtra to stand surety provided he is otherwise a fit person to stand as surety. In considering the fitness of a person the Magistrate will no doubt have to consider the solvency and respectability of the man and can also legitimately take into consideration the fact whether the surety's solvency is based on moveable or immoveable property and the availability of the property, because under section 514 Criminal Procedure Code when the surety bond is forfeited it is only the moveable property of the surety ~~bond is forefeited it is only the moveable property of the surety~~ that can be proceeded against in his life time.

Sd/- P.M. LAD,
Remembrancer of Legal Affairs.

U.R. to H.D., No. 4027, dated the 15th March 1952.

EVY. 15/6.

Legal Department

The Home Department has rightly pointed out that the District Magistrate, Mehsana's order issued by him under sections 33 and 37 of the Bombay Police Act should not have included matters which are covered by sections 130 and 131 of the Representation of the People Act, 1951. The model draft orders which should be issued under sections 33, 36 and 37 of the Bombay Police Act have been supplied to the Home Department under U.R. No. 3371, dated 29th February 1952. Those orders may be used for the purpose of the Assembly Election but not for those matters which fall within sections 130, 131 and 132 of the Representation of the People Act. The question of making use of section 144 of the Criminal Procedure Code would not probably arise in the case of the Assembly Election as the matters provided in section 144 of the Criminal Procedure Code are specifically provided in sections 130, 131 and 132 of the Representation of the People Act, 151.

Sd/- J.R.D.
Additional Secretary to Government.

U.R. to H.D., No. 4230, dated the 19th March 1952.

EVY. 15/6.

Office of the R.L.A.

Grant of Parole.

The Point raised in H.D. note is already covered by the Additional Secretary's opinion No. 18265, dated the 16th November 1951. Grant of Parole requires exercise of powers under section 401 of the Criminal Procedure Code and in case or naval or military prisoners the appropriate Government which can exercise this power is the Central Government alone (see section 402(3) of the Criminal Procedure Code and also Additional Secretary's opinion No. 17271, dated the 1st November 1952). It is, therefore, clear that is the Central Government which can grant or refuse parole and the State Government ~~xxxxx~~ has no authority in the matter. However in the type of cases mentioned by H.D. viz. where a false reason is given, there would ordinarily be no objection to turning down the request in anticipation of concurrence of the Central Government but the orders of the State Government would not strictly be legal. In order to meet the difficulty pointed out by H.D. it may be desirable to request the Central Government to delegate its powers under section 401 to this Government under Article 258(1) of the Constitution which would enable this Government to decide parole petitions from naval and military prisoners and that would obviate delay in urgent matters.

Sd/- P.M. LAD,

Remembrancer of Legal Affairs.

U.R. to H.D., No. 3559, dated the 5th March 1952.

EVY. 15/6.

Office of the R.L.A.

Detention of Members of Parliament.

The expression 'same Magistrate' is apparently borrowed from the Government of India's letter at page 1. It is possible for criminal case to be transferred; and therefore, the following verbal amendment may be made in the draft circular:

> "When the Member is released either by the same or any other Magistrate or Judge".

It is also a matter for consideration whether a Magistrate or even a Sessions Judge should not be more courteous to the Speaker or Chairman and address him as 'Sir'. The specimen of the communication enclosed by the Government of India emanated from a High Court Judge who may be privileged to address the Speaker as 'Dear' Mr. Speaker'. This may be brought to the notice of the High Court if Home Department thinks it fit to do so.

It may be useful to show the papers to Honourable the Speaker and Hon'ble the Chairman.

Sd/- P.M. LAD,
Remembrancer of Legal Affairs.

U.R. to H.D., No. 4639, dated the 27th March, 1952.

EVY. 15/6.

L.D.R.I. No. 6559 dt. 2-4-52.

Submitted.

Please R.L.A's opinion No. 3606, dated the 5th March 1952 at p. 91 ante. The R.D. (Accomodation) proposes to authorise Area Inspectors to lodge the complaints in the Court and L.D. is requested to advise whether this would be in order (p. 97 ante).

2. There is ~~x~~ no legal objection to authorise the Area Inspector to lodge the complaints.

Sd/- P.M. LAD,

R.L.A.

U.R. to R.D. (Accom.) No. 5746, dated 17-4-1952.

EVY. 15/6.

Office of the R.L.A.

As the Government has delegated to the Collector the power to appoint village accountants, that is talatis, (vide Government Notification No. 6874/33 dated 22-5-1940 appearing in the Bombay Government Gazette Part IV-A of 30-5-40 at p. 766), sanction under section 197 Criminal Procedure Code is not necessary for the prosecution of the talati under section 477 A, Criminal Procedure Code (see Emperor vs A.K.K. Pathan 47 Cr. L.J. 319, and R.L.A!s opinion in U.R. to R.D. No. 2598 dated 3-4-1946): unless the Talati is a Watandar removable only by Government.

Sd/- P.M. LAD,

Remembrancer of Legal Affairs.

U.R. to R.D., No. 6118, dated the 22nd April 1952.

EVY. 15/6.

Office of the R.L.A.

The acts complained of were within the scope of the duties of the Mamlatdar Shri Bhangale and whatever he did he purported to do in discharge of his official duty. Therefore sanction under section 197 would be necessary. (See Vishnu Tatyaba vs. Emp. A.I.R. 194, Bom. 85).

The draft sanction is in order except that the reference to the letter of the Collector should be omitted vide R.L.A's No. 14846, dated 21st December 1949.

Sd/- P.M. LAD,
Remembrancer of Legal Affairs.

U.R. to R.D., No. 407-Confl., dated the 1st May 1952.

EVY. 16/6.

Office of the R.L.A.

Attention is invited to R.L.A's opinion No. 1042-Confl., dated 14th December 1951. As Shri Lagu has ceased to be the Chief Officer and is no more in service and as he is proposed to be prosecuted for an offence under section 409 read with section 109 of the Indian Penal Code the Principles stated in the abov opinion apply to Shri Lagu also and no sanction would be necessary. Attention is, however, invited to be second para. of R.L.A's opinion No. 119-Confl., dated 29th January 1952 from which it will be seen that the facts disclosed are not sufficient to justify Shri Lagu's prosecution for abetment of the offence under section 409 of the Indian Penal Code.

Sd/- P.M. LAD,
Remembrancer of Legal Affairs.

U.R. to L.S.G. & P.H.D., No. 216-Confl., dated the 6th May 1952.

EVY. 16/6.

Office of the R.L.A.

Under section 23(2) of the Bombay District Municipal Act, 1901, the President of a Municipality can be (1) appointed by the State Government by name, or (2) an ex-officio President, or (3) elected by the Municipality, if the State Government so directs.

2. Under section 23(7) of the Act, every President who is elected by the Municipality shall be removeable from his office as such President by the Municipality by a resolution passed to that effect with a specified majority after following the specified procedure. Under the same sub-section every President shall be removeable from his office as such President by the State Government for misconduct or neglect of or incapacity to perform his duty.

3. It will, therefore, appear that a President who has been elected as such by the Municipality is removeable by two authorities, one being the Municipality, who has only to pass a resolution in the manner specified in the sub-section and the other being the State Government who can remove him for misconduct or neglect or incapacity to perform his duty.

4. Sanction under section 197(1) of the Criminal Procedure Code is necessary if the Public servant concerned is not removeable from his office "save by or with the sanction" of the State Government or some other authority. If the President' of the Municipality has been elected it is clear from the provisions already referred to that he cannot be said to be removeable from his office "save by or with the sanction" of the State Government, there being an authority other than the State Government who can remove him (see Mahmad Yasin v. Emperor, I.L.R. 52 Calcutta 431). Therefore if Shri Pattanshetti, the Present President of Mahalingpur

Municipality, has been elected as President under the requisite provisions of section 23(2) of the Bombay District Municipal Act, sanction for his prosecution would not be necessary, but if he has not been so elected, sanction would be necessary.

Sd/- P.M. LAD,
Remembrancer of Legal Affairs,.

U.R. to L.S.G. & P.H.Department, No. 1842, dated the 5th February 1952.

EVY. 16/6.

Office of the R.L.A.

It is stated in the letter of the District Magistrate, Jalgaon dated 8th April 1952 that Shri Kashinath Namdeo Patil has ceased to be the Representative Watandar and is no longer in the service of Government. In that case he cannot be said to be a "public servant who is not removable from his office save by or with the sanction" of the Statefm Government, and no sanction under section 197, Criminal Procedure Code would therefore be necessary (Emp. vs. P.A. Joshi 50 Bom. L.R. 160).

Sd/- P.M. LAD,
Remembrancer of Legal Affairs.

U.R. to R.D., No. 8112, dated the 15th May 1952.

KVY. 16/6.

Office of the R.L.A.

Sanction to Prosecute for personation Cr. P.C. - Sec. 196.

The view taken by the P. & S. D. is correct. In view of the amendment of section 196 of the Criminal Procedure Code by section 138 of the Representation of the People Act, 1951, no sanction is necessary for prosecuting Shri Kabhai for an offence of personation under section 171F of the Indian Penal Code. Even prior to this amendment no sanction was necessary in the Bombay State in view of the provisions of Bombay Act No. XXIX of 1935.

Sd/- P.M. LAD,

Remembrancer of Legal Affairs.

U.R. to P. & S. D., No. 8130, dated the 15th May 1952.

EVY. 16/6.

Office of the R.L.A.

The case having been withdrawn under section 494(a) of the Criminal Procedure Code and the Order of the Court being an Order of discharge under that provision, a fresh complaint on the same facts can lie. It is not in law necessary that there should be new materials which were not before the Magistrate formerly. It is only when the Order of discharge has been passed on a consideration of the evidence that the Court would not as a rule of practice entertain a fresh complaint on the same facts or order a fresh enquiry into the case unless the Order of discharge was foolish or preverse or was based on incomplete evidence (Nasir vs. Ch. Abdul Karim A.I.R. 1934. Lah 169).

Sd/- P.M. LAD,
Remembrancer of Legal Affairs.

U.R. to H.D., No. 465-Confl., dated the 19th May 1952.

RVY. 16/6.

Office of the R.L.A.

Charges (ii), (iii) and (iv) seek to establish inefficiency and are supported by details given in the Statement of Allegations at pages 239-40. Therefore, technically those charges could be inquired into, if the department concerned so decides. Charge No. (i) may have to be dropped in the absence of details and in view of the statements of the Collector of Kolhapur in his confidential letter dated 18th April 1952 (at page 243).

2. A departmental inquiry would not however, be justified, in view of what the Collector of Kolhapur states. A warning would seem to suffice as it was originally intended to.

Sd/- P.M. LAD,
Remembrancer of Legal Affairs.

U.R. to P. & S.D., No. 471-Confl, dated the 20th May 1952.

MVY. 16/6.

Office of the R.L.A.

The R.L.A. is requested to advise whether criminal proceedings can be taken against Shri A.N. Dave, Shri R.M. Joshi and Shri M.M. Chitnavis. The charges against these person relate to the making out and certifying false T.A. and D.A. bills of one peron named Pandurang Ramchandra. There is also a further charge against Shri Dave of making out false pay bills and T.A. and D.A. bills of a peon named Shravan Govind.

As regards Shravan Govind, it appears from the evidence that no person of that name existed and that Shri Dave used to make out pay bills and T.A. and D.A. BILLS IN HIS NAME AND PAY THE amounts to his maid servant Radhabai, whom he could not otherwise appoint as a peon. The evidence on this point is the evidence of witnesses Pandurang Ramchandra, Shravan Ramchandra and Shri M.M. Chitnavis. Of these witnesses, the testimony of Shri Chitnavis may be said to be interested because he has made certain allegations against Shri Dave, namely, that the latter as the superior officer forced him to make false T.A. and D.A. bills of Pandurang Ramchandra. Nevertheless, in view of the fact that Shri Dave has not been able to suggest that any person named Shravan Govind exists or existed and has not been able to give any details of whereabouts of that person, the oral evidence of the abovementioned three withnesses would go a long way towards establishing the charge against Shri Dave. It would, however, be desirable to obtain the testimony of some of the persons employed in the office of Shri Dave to show whether any person of the name of Shravan Govind existed and worked under Shri Dave. It may

also be profitable to investigate before a charge sheet is sent up whether the signature of Shri Dave or of any of the then employees of his office tallies with the signature of Shravan Govind on the Bills. The departmental enquiry so far as Shravan Govind was concerned was confined only to the T.A. and D.A. bill for the month of May 1950 and it has been found that Shravan Govind never accompanied Shri Dave on the tour for which the said bill was made. The other bills of Shravan Govind are not in the Papers. It may be ascertained what other bills have been drawn in the name of Shravan Govind by Shri Dave and then the items for which he should be prosecuted should be selected. The prosecution would be for offences of (1) cheating the Government (section 420 I.P.C.) or in the alternative abetment of that offence; (2) forgery for the purpose of cheating (section 468) or in the alternative abetment thereof; (3) using as genuine a forged document (section 471). Having regard to the nature of the offences and the desirability of obtaining further evidence, it will be desirable to entrust investigation into these offences to the Police.

Peon Pandurang Ramchandra was in the service of Shri R.M. Joshi in the months of January to April 1950 and June and July 1950. In the month of May 1950 he was in the service as a peon of Shri M.M. Chitnavis. Shri Joshi and Shri Chitnavis were the Food Grain Inspectors and Shri Dave was the superior officer as Assistant Food Controller (Food Inspection). The case against these people is that peon Pandurang Ramchandra always stayed at Nagpur with or under Shri Dave and never travelled with these two officers on tour. Nevertheless, these officers made out T.A. bills for him at the instance of Shri Dave who used to certify them as correct.

Now, in respect of Shri Joshi, the allegations so far as they relate to the months of January to April and July 1950, are that he drew the T.A. and D.A. bills of Pandurang as on tour with him although Pandurang never went on tour with him. The only evidence in support of this case is the oral evidence of Pandurang and Chitnavis. The evidence of Shri Chitnavis does not come to much because he only speaks of having seen Pandurang occasionally at Nagpur during those months. Therefore, Pandurang's evidence is the only evidence and that evidence will not be considered sufficient in a court of law not only because Pandurang is not an independent witness as he has admittedly quarrelled with Shri Joshi on account of the latter terminating his services, but also because Pandurang has made contradictory statements before the Enquiry Officer. He at first denied having gone to Rajnandgaon, Drug, etc., or having even seen those places, but he later on admitted having gone there on tour with Shri Joshi. Therefore, the prosecution of Shri Joshi in respect of the T.A. and D.A. bills of Pandurang for the months of January, February, March, April and July is not likely to succeed.

In respect of the month of June 1950, it is in evidence and has been accepted as correct by the Enquiry Officer that Pandurang was with Shri Joshi at Bhopal from 13th to 17th. D.A. however has been claimed from 5th to 17th. Therefore, the allegation against Shri Joshi is that the claim in respect of the days from 5th to 12th was false. In support of this allegation the evidence is of Pandurang and Shri Chitnavis. Shri Chitnavis speaks of having seen Pandurang at Nagpur on 7th and 9th June. Pandurang speaks of his being at Nagpur up to the 12th June. This oral

evidence, however, cannot be said to be independent. Pandurang is interested and Shri Chitnavis, who has been guilty of similar practices and who has to justify them on the ground of Shri Joshi following the same practice, cannot also be said to be disinterested or reliable. The oral evidence of these two witnesses is sought to be corroborated by the fact that the T.A. Bill of Pandurang for the month of May 1950 is purported to be made at Nagpur on 7/6/1950. This fact, however, is not of much importance in view of Pandurang's admission that the signatures on the T.A. bill of a peron used to be taken before his services were terminated. Pandurang's services with Shri Chitnavis were terminated on 4-6-1950 and therefore it was not impossible that the T.A. bill for May 1950 was actually signed by him on or before 4-6-1950. The other circumstances relied on in the Enquiry Officer's report merely raised suspicion and would not be of m much value in a court of law. Besides, Shri Joshi urged before the Enquiry Officer that he had two respectable witnesses from Bhopal who would testify that Pandurang was with him at Bhopal from the 5th. He gave the names of these two withnesses, one being a Munim of the firm of Messrs. Hassu Subhan & Co., and the other being the ex-agent of the Bhopal Government and the partner of Messrs. Dahyabhai & Chhote Ramzan. These witnesses were not examined by the Enquiry Officer on the ground that they were sought to be examined after the enquiry was over. Considering all these facts together, it would appear that the prosecution of Shri Joshi is not likely to succeed.

Shri M.M. Chitnavis has made a false T.A. and D.A. Bill for Pandurang for the month of May 1950. Shri Chitnavis has admitted his guilt. Apart from

that admission, there is the direct evidence of Pandurang and witness Padh, who is an independent witness. There is also circumstantial evidence in support as pointed out by the Enquiry Officer. All this evidence also shows that Shri Dave knew that Pandurang did not travel with Shri Chitnavis and knowing that he still certified the bill to be correct. In the circumstances, both Shri Chitnavis and Shri Dave can be prosecuted in respect of the T.A. and D.A. bill of Pandurang for May 1950.

It is apparent from the Enquiry Officer's report however that the brain behind these false bills was Shri Dave and it was at the instance of Shri Dave who was his superior officer that Shri Chitnavis was led to present this false bill. For that reason and also for the reason that the oral testimony of Shri Chitnavis would be of considerable help in the case, it would be desirable not to prosecute Shri Chitnavis but only Shri Dave in respect of this item. The prosecution would be for an offence of attempt to cheat (in view of the fact that the bill has not been paid as the fraud was discovered) and in the alternative for the abetment thereof.

Sd/- P.M. LAD ,

Remembrancer of Legal Affairs.

U.R. to C.S.D., No. 473-Confl., dated the 20th May 1952.

EVY. 16/6.

Office of the R.L.A.

The questions referred to R.L.A. are:

(1) Whether the District Magistrate, Nasik, couldbe requested to issue proclamation under Criminal moveable properties of Shri Bamle, whose whereabouts are not known to anybody and who, it appears, is absconding.

(2) Whether Civil suits could be filed against both the sureties (i) Chabukswar and (ii) Bamle, for the recoveries of the amounts defrauded by Shri Jagarwal, Ex-P.I. to whom both had stood sureties during the year 1948-49.

2. The answer to question (1) is in the negative.- attachment under section 88 of the Criminal Procedure Code is possible only when the accused is absconding or concealing himself for the purpose of avoiding the service of the warrant. In the present case the surety is not an accused and no warrant is pending against him. His property cannot, therefore, be attached as proposed. Moreover, the bond was not taken under the Criminal Procedure Code and no action under the Code would be feasible.

3. As regards question (2): Under the bond both the sureties have bound themselves to forfeit to Government a sum of Rs. 5000/- or such smaller sum as may be deemed sufficient by the Grain Purchase Officer to cover any loss or damage which Government may sustain by reason of default on the part of Shri Jagarwal. It will, therefore, be possible to file a suit against both the sureties for recovery of the loss suffered by Government. However in view of the fact that one surety has practically no property and the whereabouts of the other are not known, the Director Grain Purchase should consider whether it would be worthwhile taking any proceedings. If there is

no probability of the recovery of a sum at least equal to the costs there is no use filing the suit unless there are some special reasons to the contrary. (cf. Rule 108 (3) of the Law Officers Rules).

Sd/- P.M. LAD,

Remembrancer of Legal Affairs.

U.R. to C.SD. No. 7227, dated the 7th May 1952.

EVY. 16/6.

Office of the R.L.A.

The recovery of the misappropriated amount in full does not bar a criminal prosecution for misappropriation in respect of ~~them~~ that amount.

Sd/- P.M. LAD,
Remembrancer of Legal Affairs.

U.R. to E.D., No. 602-Confl., dated the 26th June 1952.

XVI. 16/6.

Office of the R.L.A.

The High Court has held that the services of the accused having been effectively terminated, in accordance with the provisions of law, before his prosecution, sanction under section 197, Criminal Procedure Code for his prosecution was not necessary. The revision application has been allowed, the order passed by the Magistate has been set aside and the matter has been sent back to him with a direction that he should dispose it of accoring to law.

Sd/ - P.M. LAD,
Remembrancer of Legal Affairs.

U.R. to L.S.G. & P.H.D., No. 673-Confl., dated the 12th July 1952.

RVY. 16/6.

Office of the R.L.A.

The proper course in this case is for Government to bring the facts to the notice of the High Court through the Government Pleader. If the illegality of a conviction is brought to the notice of the High Court, there should not be a refusal on its part to interfere merely because the accused concerned is quite content with the order and does not wish to challenge it.

Any prosecution of the accused for offences under section 182 and 205, Indian Penal Code will require a complaint either by the Magistrate's Court or by the directions of the High Court (section 195 Criminal Procedure Code). The Government Pleader High Court may be instruced to secure such directions from the High Court in the proceedings which he will be asked to initiate.

Sd/- P.M. LAD,

Remembrancer of Legal Affairs.

U.R. to H.D., No. 8826, dated the 27th May 1952.

EVY. 16/6.

Office of the R.L.A.

The points raised by the District Magistrate, Broach in his letter dated 19-6-1952 are covered by the observations in the judgment of the Bombay High Court in Boywalla vs. Sorab Engineer (53 Bom. L.R. 529) which case has been referred to by the R.L.A. in his previous opinion. The relevant observations are as follows:-

> "When in the case of a man who has been arrested and released on bail, the police officer reports that there appears to be no case, and invites the Magistrate to discharge the man, the Magistrate is not bound to act upon the Police view. He can undoubtedly say& I will have a further inquiry in this matter. I think the police are wrong in suggesting that the accused should be discharged.' And he may direct further investigation. On the other hand, I have no doubt that he may say& 'I & have no reasonm for thingking that the report of this police officer, who is a responsible person, is wrong, and if he tells me that after investigation he thinks there is no case, I will do as he suggests and discharge the accused.' But in either case the Magistrate is taking cognizance of the case. He cannot discharge the accused, or direct a further investigation, unless he first takes cognizance. The learned Magistrate in discharging the accused is making an order similar in character to the order which he can make under sec. 203 of the Criminal Procedure Code, where he acts on a report of the police or an investigation undertaken at his request. If after considering the report he thinks that there is no sufficient ground for proceeding, he may discharge the accused. Although the Code does not expressly so provide, I

have no doubt that a Magistrate can act upon the report of a Police officer as to the result of a police inquiry undertaken under the Code & in accordance with the powers conferred upon the police, and can discharge an accused person without further inquiry. But in such a case the order of the Magistrate is a Judicial order, which would be open to review by this Court".

Sd/- P.M. LAD,
Remembrancer of Legal Affairs.

U.R. to H.D., No. 11756, dated the 16th July 1952.

EVI. 16/6.

Office of the R.L.A.

There is both oral and documentary evidence to show that between 8 and 9 p.m. when the Circle Inspector is alleged to have taken a bribe at the chora in the village he was really away from the village in the fields making panchnamas in presence of panchas. There is also evidence of motive for making this false allegation. There is, therefore, a prima facie case for the prosecution of Shri Ambalal Samaldas for an offence under section 182 Indian Penal Code.

2. The false information in this case has been given to four differerct public servants, namely:-

1. The Minister for the Home and Revenue
2. The Collector, Ahmedabad,
3. The Assistant Collector, Ahmedabad,
4. The Mamlatdar, Daskroi.

any one of them may file a complaint as required by section 195(1)(a) of the Criminal Procedure Code. It would be desirable to have the complaint filed by the Collector.

Sd/- P.M. LAD,
Remembrancer of Legal Affairs.

U.R. to R.D., No. 11759, dated the 16th July 1952.

EVY. 16/6.

Office of the R.L.A.

The only applications of Fidahusein Abdul Kadir which are in the file sent to Legal Department are those dated 18-6-1951 and 29-10-51. The former is addressed to the Secretary to Government, the latter to the Secretary to Government, Home Department,. It may be assumed that the first application was also intended for Secretary to Government, Home Department. In these applications there are two allegations: one is about deceased Mohmed Fidahusein having been murdered by certain persons, the other is about Junior Police officers having accepted bribes. It is not stated therein who were the murderers, but later on in police inquiry he is alleged to have named Abdeali and his sons Husein and Roshan Khan. A copy of that statement has not been forwarded to Legal Department. As regards the bribe the only police officer named as receiver is Sub-Inspector Paware.

Inquiry has been made only in respect of the allegations about mufder. No inquiry has been made regarding the allegations of corruption. It is, therefore, presumed that the proposed action under section 182 of section 211 Indian Penal Code is in respect of the alleged false allegations of murder.

In respect of these allegations of murder, the Magistrate has granted a B summary. The granting of B summary is a judicial order. Therefore, if any prosecution has to be launched against a person who has instituted or caused to be instituted criminal proceedings or has falsely charged any person with having committed an offence, it is the Court which granted B summary which has to do it as required by section 195(1 (b) of the Criminal Procedure Code (Boywala v. Sorab Engineer, 43 Bom. L.R. 529). The Court has already

taken action against Fatmabai who gave the actual complaint. It appears from t he police report that Fatmabai filed the complaint at the instance of Fidahusein Abdeali,. If so the Court may be moved to take similar action against the said Fidahusein also.

When on the facts a graver offence under section 211 Indian Penal Code is disclosed, it is not permissible to take action only under section 182 Indian Penal Code so as to bypass the requirements of section 195(1)(b), Criminal Procedure Code (Emp. Vs. Bayaji Appaji Khote 47 Bom. L.R. 664).

Sd/- P.M. LAD,

Remembrancer of Legal Affairs.

U.R. to H.D., No. 11813, dated the 17th July 1952.

EVY. 16/6.

Office of the R.L.A.

The evidence is not sufficiently strong for a successful prosecution. The evidence is all oral and the witnesses are interested. The finding of the Civil Judge, Kalyan on the point of the agreed consideration cannot be relied on as the decision of the suit being in favour of Shri Sarda he could not appeal against it and challege that finding. As against the oral evidance against Shri Sareda, there is both oral and documentary evidence in his favour. The oral evidence is of the vendee and the broker Bansilal. The documentary evidence is the entries in the account books. No doubt the account books are now lost but the Mamlatdar himself had seen the entries before they were lost. In the circumstances a prosecution has not much chances of success.

Sd/- P.M. LAD,

Remembrancer of Legal Affairs.

U.R. to R.D., No. 685-Confl/, dated the 17th July 1952.

EVY. 16/6.

Office of the R.L.A.

In this case Government was dissatisfied with the order of the Principal Judge of the City Civil Court whereby he exempted the surety for the sum of Rs. 2 lakhs and accepted Rs. 1 lakh in cash when Mubarakali for whose appearance the surety was given escaped during the course of the trial; and ~~xxxxxxxxx~~ accordingly a regision application was filed to the High Court. The Chief Justice who heard the application, felt himself unable to interfere because the discretion has already been exercised by the Principal Judge and it would not be proper to interfere with it. However, he said in his judgement twice that (1) "the position in law might have been different if I was exercising the judicial discretion vested under section 514(5)" and again (2) "as I said before, if I was exercising the discretion the position might have been different". These remarks of the Chief Justice make it abundantly clear that he would not have himself exercised the discretion in the manner the Principal Judge of the City Civil Court did. This Pronouncement should be sufficient to dispose of any argument based upon observations made by the Principal Judge. That being so, this was a case where really the Principal Judge of the City Civil Court ought to have exacted the whole amount of the surety bond, namely, Rs. 3 lakhs and should not have remitted Rs. 2 lakhs and been content with only Rs. 1 lakh. In these circumstances, no importance need be attached to his recommendation that "if the accused is hereafter arrested ~~x~~ onaccount of the help given by the surety or on account of the reward offered by the surety, he may apply to Government to refund to him part of the penalty paid by him, and I am sure Government will favourabley consider his application." Moreover, it must also be pointed out that Mubarakali's presence was not secured by any help

given by the surety or on account of reward offered by him. The circumstances in which Mubarakali was brought to India and the efforts Government made for that purpose are well known. On the whole, therefore, there is no case whatsoever for refunding the amount which has been forfeited.

Sd/-

Remembrancer of Legal Affairs.

U.R. to M.D., No. 703-Confl., dated the 21st July 1952.

EVY. 16/6.